



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2019/0467

Decided without a hearing

Before

JUDGE DAVID THOMAS

TRIBUNAL MEMBERS DAVID WILKINSON AND DAVE SIVERS

Between

ROY PIKE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

The appeal is dismissed. No further action is required of the public authority.

NB Numbers in [square brackets] refer to the open bundle

1. This is the appeal by Mr Roy Pike against the rejection by the Information Commissioner (the Commissioner) on 3 December 2019 of his complaint that Swards End Parish Council (the Council) had wrongly refused to disclose certain information to him under section 1(1)(b) Freedom of Information Act 2000 (FOIA).

2. The parties opted for paper determination of the appeal. The Tribunal was satisfied that it could properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).¹

The request

3. On 8 May 2019, Mr Pike made the following request of the Council [31]:

'I requested an understanding of the recategorization to make sense of the clerks expenses. If you look at the documents "Working Details for Annual Meeting" and the "account Statement" both for 2018 changes were made to the way the clerks expenses were accounted for in the Account statement following the intervention of the auditor. As these documents were prepared and signed off by the clerk, I cannot accept that she was not aware of the basis for the changes. I assume that as this categorisation will be an ongoing requirement it beggars belief that there is no knowledge of the new requirements.

Alternatively, why could not the auditor be approached for an explanation?

Therefore as you seem reluctant to provide this information I wish to make a request under the FOI act for you to supply this Information' (his emphasis).

4. It appears that, on the advice of the Council's internal auditor, the categorisation of expenses had changed for the 2018/9 financial year. In particular, expenditure previously attributed to staff costs were now attributed to general office expenses. Mr Pike want to know more about the change.
5. It is evident from the surrounding correspondence that he had concerns about the clerk's expenses. He is entitled to scrutinise the expenses and to hold the Council to account but these are not matters for the Tribunal.
6. Mr Pike has made a number of FOIA requests of the Council, some on the same day as the present request.

The initial response and review and the Commissioner's decision

7. Both in its initial response and on review the Council said that it did not hold the requested information.
8. Following Mr Pike's complaint, the Commissioner probed the Council (asking what searches it had made, for example) but concluded, on the balance of probabilities, that it did not hold the information.

¹ SI 2009 No 1976

The Grounds of Appeal

9. In his Grounds of Appeal [6, 12], Mr Pike made the point that recategorization is not a one-off requirement and suggested that, since the clerk had retained her expenses claims, she could recreate the allocation of expenses.

Discussion

10. Under FOIA, members of the public have a qualified right to information held by public authorities on request. However, it is self-evident that a public authority can only disclose information which it holds.

11. Section 3(2) FOIA contains a partial definition of whether information is held:

*‘For the purposes of this Act, information is held by a public authority if –
(a) it is held by the authority, otherwise than on behalf of another person, or
(b) it is held by another person on behalf of the authority’.*

The definition means that mere possession by a public authority of information is not sufficient (if it is held on behalf of someone else) but also that possession is not necessary (if the information is held on behalf of the authority by someone else). An example of the latter would be an archive company.

12. Importantly, for it to be disclosable information must also be held in recorded form. This is because the definition of ‘information’ in section 84 FOIA is ‘(subject to sections 51(8) and 75(2) [not relevant]) ... information recorded in any form’. ‘Recorded form’ implies a degree of permanence. Information which is simply in the mind of an employee is not held in recorded form.
13. It follows that the issue is whether the information Mr Pike has requested is held by the Council in recorded form. In order to determine that question, the Tribunal has first to construe the request. In its judgment, Mr Pike was asking for information explaining the recategorization of expenses. He was not asking for information detailing or evidencing the expenses. That is evident from his request: ‘I requested an understanding of the recategorization to make sense of the clerks expenses ... I cannot accept that she was not aware of the basis for the changes ... it beggars belief that there is no knowledge of the new requirements’.
14. The fact that an authority might be expected to hold particular information is not determinative but could indicate that it does, in fact, hold it. Equally, if one would not expect an authority to hold the information, that might be a good indication that it does not hold it. Ultimately, however, an assessment has to be made, on the balance of probabilities, whether in all the circumstances the authority holds the requested information.

15. It is also important to understand that there is no obligation under FOIA on public authorities to obtain or create information so that it can be supplied to a requester, however easy that would be to do.

16. In her response to the Commissioner on 20 November 2019 [71], the Council clerk said:

'The Clerk and [the Council] have explained to Mr Pike on several occasions, including at an in-person meeting arranged for Mr Pike to inspect the [Council] accounts, that the adjustment was made following a conversation between the Clerk and the internal auditor. The internal auditor requested a re-categorisation of some of the expenses from staffing costs to general payments. There was no question relating to the quantum of the payments or supporting evidence.

No written record of the changes were kept by either the Clerk or the internal auditor, but the adjustments were made as requested and the audit form was initialled by the Clerk.

This has been explained to Mr Pike on numerous occasions and he has been provided with the documentation supporting the payments that were approved by the PC. There is simply no further written or other information available that can be supplied to Mr Pike' (emphasis added).

17. The Tribunal accepts what the clerk says. One might have expected the auditor to make some record of the change they were advising – whether in a note or an email – but the Tribunal accepts that, for whatever reason, that did not happen. The Council has been open with Mr Pike about the clerk's expenses and the accounts more generally, inviting him to inspect them at a Council meeting. There is no evidence of subterfuge and no obvious motive, therefore, for suppressing information about the recategorization of expenses.

18. In fact, Mr Pike believes he knows why the expenses were recategorized. In his Reply (an email sent on 2 February 2020) [25], he says: 'The account documentation for 2017/18 was amended on the Internal Auditors instructions to reflect changes in the way the Clerks expenses were accounted for. The guidelines for these changes were outlined in the JPAG Governance and Accountability for Smaller Authorities in England dated March 2018. Staff costs page 18 of the document states that these costs should be split between Staff costs – benefits like mileage, travel and Others such as office costs etc'. It is not for the Tribunal to assess whether Mr Pike's supposition is correct but it certainly provides a rational explanation for the change. It may be that the auditor thought that, since they were simply implementing official guidance, there was no need to keep a written record of the reason for the change. In any event, the Tribunal accepts that there is no written record, in the hands of either the Council or the auditor.

19. In his Grounds of Appeal, Mr Pike suggests that the clerk could 'recreate the allocation of expenses at will'. No doubt the Council does hold information about the expenses, but it is not the information Mr Pike has asked for: rather, he has

asked for an explanation for the recategorization. In any event, he attaches to his Grounds of Appeal a *Statement of Variance 2018/19* which shows reattribution of expenses from the clerk's to stationery.

Conclusion

20. For these reasons, the appeal is dismissed. The decision is unanimous.

Judge David Thomas
Judge of the First-tier Tribunal
Date: 8 June 2020
Date Promulgated: 9 June 2020